

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X **Docket#**
SINCLAIR, et al., : 17-cv-01058-DLI-VMS
Plaintiffs, :
:
- versus - : U.S. Courthouse
: Brooklyn, New York
:
TEA AT THE CENTER, INC., : April 18, 2017
Defendant :
-----X

TRANSCRIPT OF CIVIL CAUSE FOR VERA M. SCANLON
BEFORE THE HONORABLE VERA M. SCANLON
UNITED STATES MAGISTRATE JUDGE

A P P E A R A N C E S:

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1 THE COURT: All right. So this is Sinclair,
2 et al. v. Tea At The Center, Inc., 17-CV-1058.

3 So let me first get plaintiffs' counsel's
4 appearance first.

5 MR. WIMS: David C. Wims, Brooklyn, New York.

6 Good afternoon, your Honor.

7 THE COURT: Good afternoon. And with you?

8 MR. WIMS: With me are the plaintiffs,
9 Alexander Zarlengo and Jerwayne Sinclair.

10 THE COURT: And for defendant?

11 MR. POLS: All right. Donald Pols, Beilis &
12 Pols for the defendant, your Honor.

13 THE COURT: Okay. So for the plaintiffs, you
14 may have already heard this or not, your case is one of
15 those interesting procedural posture. So in general, and
16 why we're here is that the appellate court, which is
17 called the Second Circuit Court of Appeals has a case
18 that says, in sum, that when there's settlements of Fair
19 Labor Standards Act cases, the trial court, so the Court
20 that you're in right now needs to look at the settlement
21 and determine whether it's fair and reasonable and
22 generally speaking, two criteria; one is, is it fair and
23 reasonable as between each side and then is it fair and
24 reasonable as between you and your attorneys.

25 Why I say we're at an interesting point is

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1 there's some debate among the judges who handle these
2 cases as to whether the way your case was resolved which
3 is this Rule 68, all right. Basically, the defendants
4 made an offer and you and your attorneys decided to
5 accept the offer. There's a disagreement as to whether
6 this approval process applies.

7 That being said, the trial judge on your case
8 says this approval process applies. So we're going to do
9 it. So it's just an interesting case and there are some
10 interesting orders related to that in the record.

11 So what I have them in terms of the paper, just
12 again so the record is clear is the filing on the docket
13 at 9, which is filed April 11th, so it's the joint
14 motion. Both sides are asking the Court to approve the
15 Fair Labor Standards Acts settlement.

16 So in support of that, attached at 9-1 is Mr.
17 Wims' declaration and the retainer agreement at 9-2 and
18 actually it continues because there's two plaintiffs, two
19 agreements and a copy of the docket. So the various
20 expenses are there and then Mr. Wims -- I think this is
21 your -- these are your time sheets, right, Exhibit 3?
22 Right?

23 MR. WIMS: Correct, your Honor.

24 THE COURT: Okay. You can stay seated. It's
25 actually easier for me to hear if you're closer to a

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1 microphone. So if everybody just wants to pull it
2 closer.

3 Okay. So that is the lay of the land. So for
4 the -- just so the plaintiffs know, lawyers have done
5 this either with me or other judges. What we're going to
6 do is I'm going to ask each of the lawyers to just tell
7 me their view on the settlement and then ask you some
8 questions regarding whether you think it's a fair and
9 reasonable settlement.

10 So, Mr. Wims, you're up.

11 MR. WIMS: Your Honor, this is obviously a FLSA
12 action alleging unpaid overtime and the plaintiffs were
13 former employees of the defendant restaurant. There were
14 -- during their tenure, they worked in excess of 40 hours
15 per week, pretty -- relatively frequently.

16 The defendant failed to make and keep
17 contemporaneous time records during the plaintiff's
18 tenures. So we had to attempt to reconstruct the
19 "reasonable" amount of whatever the settlement raised
20 based on my client's recollection and the disputed
21 contentions of defendant's principals.

22 Based on the amounts of the tenure, we arrived
23 at the figure that is -- we're asking you to approve
24 which is \$7,400 in total.

25 Mr. Sinclair worked for, I think, about 15

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1 months, 16 months, somewhere around there. Mr. Zarlengo
2 was there for about six months.

3 The -- interestingly, there was an
4 (indiscernible) in this case that's directly relevant to
5 Cheeks in that Mr. Sinclair, proceeding pro se in the
6 fall of last year negotiated a resolution of his waived
7 claims with the defendant directly, not with -- neither -
8 - neither side had counsel in that transaction, I
9 believe.

10 Then Mr. Sinclair and Mr. Zarlengo came to me
11 and we were able to negotiate the resolution as we
12 present to you today. We're asking first of all, based
13 on our numbers, we think it's fair and reasonable under
14 the circumstances. I explained to my clients the risks
15 involved in litigating against -- just in litigation in
16 general but more importantly here, where to prevail, the
17 jury would have to find their recollection credible as to
18 the number of hours worked and it could be a long time.

19 There were considerations as to the defendant's
20 ability to possibly satisfy any judgment were it to be
21 two years from now or whatever the case may be.

22 So counsel and I engaged in arms' length
23 negotiations and arrived at the figures that have been
24 submitted to the Court.

25 THE COURT: Okay. So just so I understand the

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1 numbers. Looking at page 2 of your affidavit, so if Mr.
2 Sinclair's view in connection with you, that he would
3 have gotten \$8,000 but he negotiated \$6,500 himself
4 anyway. So this really -- just the \$1,500 left. Am I
5 reading this right or --

6 MR. WIMS: No.

7 THE COURT: Okay. Tell me what it would be.

8 MR. WIMS: The \$8,000 was what -- based on what
9 he says he worked, an hourly rate what we think his total
10 recovery could have been minus the \$6,500 that was paid
11 to him directly and this settlement here, he would get --
12 we settled for an additional \$4,000 less the fees. So --

13 THE COURT: Okay. So when you say his -- does
14 the \$8,000 include liquidated damages?

15 MR. WIMS: Yes.

16 THE COURT: Okay.

17 MR. WIMS: It does. There were some other
18 claims that we sort of threatened to bring that also --
19 that we didn't include in the complaint that sort of
20 brought the defendant's to the table as well but that's
21 our calculation and so he's actually getting more than
22 what could be recovered just with respect to overtime.

23 THE COURT: So the maximum overtime including
24 liquidated damages would be \$8,000?

25 MR. WIMS: Yes.

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1 THE COURT: He got \$6,500?

2 MR. WIMS: That's about -- previously, correct.

3 THE COURT: Previously.

4 MR. WIMS: And this pursuant --

5 THE COURT: And which would leave, to state the
6 obvious, \$1,500 unpaid --

7 MR. WIMS: Right. And he would get four
8 pursuant to the settlement if it's approved, less the
9 one-third of the term, which we said would be about
10 \$2,800.

11 THE COURT: Okay.

12 MR. WIMS: Mr. Zarlengo -- his recovery on this
13 would be \$3,000 gross, less the fee, would be \$2,000.

14 THE COURT: Okay. And when you say his
15 recovery would be \$2,000 that also includes liquidated
16 damages?

17 MR. WIMS: No, no.

18 THE COURT: All right.

19 MR. WIMS: I'm saying the \$3,000 is what we
20 calculate as what would be owed to him.

21 THE COURT: No. I'm sorry. So Zarlengo,
22 paragraph 15, "If plaintiff Zarlengo incurred all unpaid
23 overtime to which he claims entitlement which is disputed
24 by the defendant, the total would be approximately
25 \$2,000. The amount he will get pursuant to instant

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1 settlement is \$3,000."

2 Is that \$2,000 --

3 MR. WIMS: Oh, it should say 3, they both
4 should say 3, in paragraph 15.

5 THE COURT: Uh-hum. Okay. So -- but that
6 \$3,000 is -- includes liquidated damages?

7 MR. WIMS: Yes.

8 THE COURT: Okay. So they're both getting --
9 let me just look at the numbers for a second. They're
10 both getting a full recovery. All right. So then the
11 obvious question, sorry to ask the awkward one, but
12 that's why I am here, is why are their numbers different,
13 particularly to the proportion, at least that they're
14 recovering, right? Because it looks -- you have Mr.
15 Sinclair basically is owed -- including liquidated
16 damages, could get \$1,500 but he's getting \$4,000 and Mr.
17 Zarlengo could get \$3,000 including liquidated damages
18 and that's what he is getting.

19 So obviously one party is getting more with
20 regard to what's over and above what's still outstanding
21 arguably, right? So why are the numbers proportionately
22 different? Do they have different claims?

23 MR. WIMS: No, they both allege off-the-clock
24 overtime work.

25 THE COURT: Uh-hum.

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1 MR. WIMS: The -- we arrived at those numbers
2 via negotiations. So without -- you know, we weren't --
3 I think we were just talking numbers as opposed to
4 proportions of potential recovery. So, you know, Mr.
5 Sinclair was there much longer at greater potential
6 damages.

7 THE COURT: All right. I'm still confused as
8 to why he had greater potential damages based on what you
9 say here. I'm not saying there's not a reason. I just
10 don't know what it is.

11 MR. WIMS: Why he had greater damages? His
12 tenure was longer.

13 THE COURT: No, as -- this is - I'm just basing
14 what I am asking based on what you say in your affidavit.
15 So looking at paragraphs 14 and 15. According to 14, Mr.
16 Sinclair was only owed at best \$1,500 and yet he is
17 getting \$4,000.

18 MR. WIMS: Correct.

19 THE COURT: And Mr. Zarlengo is owed \$3,000 at
20 best, because I am saying that includes liquidated
21 damages and he's getting \$3,000. So why is Mr. Sinclair
22 getting significantly more relative to his claim, than
23 Mr. Zarlengo? There may be other claims that I don't
24 know about or something but I mean, the point is whether
25 the overall settlement is fair and reasonable and

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1 obviously, that's -- there's a question.

2 And it might be they have other claims other
3 than the overtime but that's not what it says here, so I
4 am trying to understand.

5 MR. WIMS: Yeah, I'll -- I mean, that's -- from
6 plaintiff's perspective, that's what we negotiated, your
7 Honor. I mean, maybe defense counsel can shed some more
8 light on why they consented to what they did.

9 THE COURT: Right. It was a Rule 68, right?

10 MR. POLS: Excuse me?

11 THE COURT: It was originally -- it's a Rule
12 68, right? So --

13 MR. POLS: Yes.

14 THE COURT: -- why are the numbers what they
15 are?

16 MR. POLS: Well, this was from defendant's
17 stand point. It was an overall negotiated settlement. I
18 mean, we reconstructed records. We had the recollections
19 of the supervisors as to, you know, the days that the
20 facility was open and how long different people worked
21 and it seemed to be from our stand point, a fair and
22 reasonable number for the employer.

23 THE COURT: Okay. I still don't understand
24 what the over arching principal that should be considered
25 in terms of why the numbers are what the numbers are.

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1 MR. POLS: Well --

2 THE COURT: And one plaintiff is getting a much
3 higher recovery relative to what was allegedly owed him
4 compared to the other and so to determine, you know, it's
5 fair and reasonable, less concerned about why as
6 comparing the two as much as it says, you know, basically
7 on this, one is getting much higher damages and why isn't
8 the other one getting that same, you know --

9 MR. POLS: Are you referring to Zarlengo's
10 recovery of \$4,000 --

11 THE COURT: Right. These are the numbers that
12 are here. Sinclair was -- plaintiff Sinclair allegedly
13 was owed \$8,000. That, I understand includes liquidated
14 damages which would mean if you applied the standard
15 formula, he was claiming \$4,000 in unpaid overtime plus -
16 - right, and you double that for the liquidated damages
17 He got \$6,500.

18 MR. POLS: Right.

19 THE COURT: So he only had a claim of 15 -- in
20 this lawsuit, he could only have had a claim of \$1,500.
21 So even though his claim is only \$1,500, he's getting
22 three times that -- more than three times. No, sorry,
23 he's getting almost three times that.

24 MR. POLS: And --

25 THE COURT: He's getting \$4,000.

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1 MR. POLS: Your Honor, is your question why did
2 we agree to pay him more than he may have been entitled
3 to?

4 THE COURT: Well, the question is only is it
5 fair and reasonable and I'm trying to -- I'm not trying
6 to take any money back from anybody. I want to
7 understand what it is that's being applied here because
8 in one, the person is only getting the damages and --
9 right, the overtime damages and then the other there's
10 extra money.

11 Now maybe there's other reasons and just nobody
12 has articulated it which, you know, for example, the one
13 that would leap out is you were just saying there wasn't
14 -- not you but defendant's -- sorry, plaintiffs' counsel
15 was saying there were not good records. And so if Mr.
16 Sinclair was there longer, he might have a stronger claim
17 for the claim that people make about penalties for poor
18 record keeping but again, nobody is saying this, so
19 really --

20 MR. POLS: I --

21 THE COURT: And maybe there's other information
22 that I don't have that I just need you to put on the
23 record.

24 MR. POLS: -- I --

25 MR. WIMS: I think I might be able to address

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1 that, your Honor.

2 THE COURT: Okay.

3 MR. WIMS: Because defendants -- defense
4 counsel and I came to different (indiscernible) notes --

5 THE COURT: Okay.

6 MR. WIMS: -- based on the numbers that were --
7 I mean, what I put in my affidavit is what my
8 calculations are.

9 THE COURT: Uh-hum.

10 MR. WIMS: Counsel's were a little different
11 and I think that's why Mr. Sinclair is getting more than
12 my calculations are that he's owed in overtime.

13 THE COURT: Okay. So this is not prompted at
14 all by plaintiffs' side but by the defendant's
15 calculations? Is that right?

16 MR. POLS: Yes.

17 THE COURT: All right.

18 MR. POLS: From the plaintiffs' side, the
19 plaintiff is looking to limit risks and hazards of
20 litigation and legal fees --

21 THE COURT: The defendant.

22 MR. POLS: From the defendant's --

23 THE COURT: Right.

24 MR. POLS: -- side rather. The defendant is
25 looking to limit risks and hazards of litigation and

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1 legal fees. The defendant is not -- doesn't have a
2 personal interest in how that settlement is allocated
3 between the various plaintiffs.

4 THE COURT: Okay. All right. And then on the
5 -- go ahead. Were you going to say something else?

6 MR. WIMS: I'm fine. No, no, go ahead, your
7 Honor.

8 THE COURT: And then on the attorney's fees
9 piece? You have the one-third retainer.

10 MR. WIMS: Yes. We have --

11 THE COURT: Plus costs.

12 MR. WIMS: -- a retainer agreement for one-
13 third with both plaintiffs.

14 THE COURT: All right. And then your lodestar
15 would be \$2,800?

16 MR. WIMS: Correct. And then the -- on top of
17 the \$7,000 rate, so to speak, the defendant's
18 (indiscernible) \$400 costs that were advanced by my
19 office with respect to the filing.

20 THE COURT: Okay. All right. So anything else
21 for counsel and then I will just ask the parties some
22 questions.

23 MR. WIMS: I have nothing further from
24 plaintiffs' counsel.

25 MR. POLS: Nothing further from defendant's

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1 counsel.

2 THE COURT: Okay. So -- this is for the
3 individual plaintiffs. So what I have is I went over the
4 documents and included in Mr. Wims' declaration
5 explaining the basis of the settlement and from I think
6 what we have been able to gather, there's a disagreement
7 almost in your favor, really in plaintiffs' favor as to
8 what the outcome of these claims might be.

9 And so I was trying to understand why the
10 differences were here but focused on plaintiff's counsel
11 and obviously the answer really seems to be here from the
12 defendant's side.

13 So let me just ask each of you, so for each of
14 you, did you ever read the complaint? Do you know what
15 the document is that was filed with the Court saying what
16 your claims are? Why don't you pull the microphones and
17 just -- just if you could say your name before you --
18 just so that we could know who is speaking.

19 MR. SINCLAIR: Jerwayne Sinclair.

20 THE COURT: Okay. So did you read the
21 complaint? That's the document that says what your
22 complaints were?

23 MR. SINCLAIR: Yes.

24 THE COURT: And did you understand it?

25 MR. SINCLAIR: Yes.

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1 THE COURT: Okay.

2 MR. SINCLAIR: And then Mr. Zarlengo, same
3 thing. Did you read the complaint?

4 MR. ZARLENGO: Yes.

5 THE COURT: I think that mic isn't on.

6 MR. ZARLENGO: Yes.

7 THE COURT: There you go. And did you
8 understand it?

9 MR. ZARLENGO: Yes.

10 THE COURT: Okay. And do you understand that
11 there was an offer to settle the case? All right. The
12 lawyer for the defendant, they offered you money to
13 settle the case.

14 MR. ZARLENGO: Yeah.

15 THE COURT: And do you understand that?

16 MR. ZARLENGO: Yes.

17 THE COURT: So each of you has to answer for
18 yourself.

19 MR. SINCLAIR: Yes, your Honor.

20 THE COURT: Okay. All right. And do you
21 understand in settling the case, that means that your
22 claims are completely finished if this settlement is
23 approved?

24 MR. ZARLENGO: Yes.

25 THE COURT: Do you understand?

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1 MR. SINCLAIR: Yes.

2 THE COURT: Okay. So in the same -- you know,
3 before you were able to negotiate a settlement and then
4 you came back and had the follow-up lawsuit, like that's
5 not going to happen here. This is it. Do you understand
6 that?

7 MR. ZARLENGO: Yes.

8 THE COURT: Each of you understand -- okay.
9 And then so for Mr. Sinclair, do you understand that from
10 the defendants, what you're going to receive which will
11 later be divided between you and your attorney is the
12 \$4,000. Do you understand that?

13 MR. SINCLAIR: Yes.

14 THE COURT: All right. And then Mr. Zarlengo,
15 do you understand you're receiving \$3,000.

16 MR. ZARLENGO: Yes.

17 THE COURT: Can you say it closer to the mic?

18 MR. ZARLENGO: Yeah.

19 THE COURT: Okay. And then for each of you, is
20 it right that you entered into a retainer agreement with
21 your lawyer?

22 MR. ZARLENGO: Yes.

23 THE COURT: Okay, you did?

24 MR. SINCLAIR: Yes.

25 THE COURT: And do you understand that your

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1 lawyer is going to be paid from the amount of money that
2 you're each receiving from the defendants?

3 MR. SINCLAIR: Yes.

4 MR. ZARLENGO: Yes.

5 THE COURT: Okay. All right. So for each of
6 you, are you in agreement with the settlement?

7 MR. SINCLAIR: Yes.

8 MR. ZARLENGO: Yes.

9 THE COURT: And are each of you satisfied with
10 the work that your lawyer Mr. Wims did on your behalf?

11 MR. SINCLAIR: Yes.

12 MR. ZARLENGO: Yes.

13 THE COURT: Okay. Let me just talk to counsel
14 about the logistics. Was the money paid? I know you
15 have the order from the district judge not allowing the
16 distribution but --

17 MR. WIMS: No, I followed the order, your
18 Honor.

19 THE COURT: Okay. All right. So what will
20 happen is that -- I'm not sure if it will be today but
21 anyway, there will be an order entered recommending to
22 the district judge that the settlement be approved
23 because in this case, each of the plaintiffs is receiving
24 very unusually, you know, all of the damages and then
25 really you're getting not just the money, so the

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1 plaintiffs understand but that there's a claim here that
2 you're supposed to get some money for not being paid
3 overtime and then there's a penalty in the law that you
4 get twice that amount.

5 And through these negotiations, you're getting
6 the whole amount. I have hundreds of these cases and
7 that rarely happens. So you have a good settlement. And
8 the obviously, you've got to pay your lawyer out of that.
9

10 All right. So anything else that should be
11 said on the record here?

12 MR. WIMS: No, your Honor.

13 THE COURT: No?

14 MR. POLS: No. I have nothing further, your
15 Honor.

16 THE COURT: No. You've got to answer out loud.

17 MR. SINCLAIR: No, thank you.

18 THE COURT: Anything?

19 MR. ZARLENGO: No.

20 THE COURT: Okay. So like I said, there will
21 be an order and then the district judge will decide --
22 let me just ask the lawyers one practical question. My
23 report and recommendation is going to recommend that this
24 be approved because it's certainly a good settlement for
25 the plaintiffs. You can agree to limit the time that you

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1 have for objections, if you want to do that on the
2 record.

3 MR. WIMS: Plaintiffs will waive their
4 objections, your Honor.

5 MR. POLS: And the defendants will too, your
6 Honor.

7 THE COURT: All right. So I will note that and
8 it's still up to the district judge if she wants, you
9 know, to accept the report and recommendation but I'll
10 note that you waive the objections. All right. Thanks
11 for coming in. Thank you for your patience.

12 MR. WIMS: Thank you, your Honor.

13 MR. POLS: Thank you, your Honor.

14 THE COURT: Have a good day.

15 (Matter concluded)

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C E R T I F I C A T E

I, LINDA FERRARA, hereby certify that the foregoing transcript of the said proceedings is a true and accurate transcript from the electronic sound-recording of the proceedings reduced to typewriting in the above-entitled matter.

I FURTHER CERTIFY that I am not a relative or employee or attorney or counsel of any of the parties, nor a relative or employee of such attorney or counsel, or financially interested directly or indirectly in this action.

IN WITNESS WHEREOF, I hereunto set my hand this 1st day of May, 2017.


Linda Ferrara

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